

1 A No. I think the intention permeates Universal.
2

3 Q Let's turn now to the experience in the spring of
4 1975 when your company first became interested in doing a King
5 Kong remake.

6 Would you tell us when that interest first came
7 to your mind or came to your attention.

8 A Yes, as best I can.

9 I happened to be in the City of New York, I believe
10 in March of 1975, when one evening as I was getting dressed
11 I received a phone call from Hans Stromberg. Mr. Stromberg
12 said that he was calling me in New York because he had some-
13 thing he thought was terribly exciting that he couldn't resist
14 not calling me about.

15 And I said, "What is it?"

16 And he said, "I think we ought to make a King Kong
17 film."

18 I was a bit taken aback by that. I thought about
19 it for a moment and I think I may have turned to my wife, who
20 was in the room, and said something like, "What do you think
21 about making a King Kong film," or words to that effect.

22 And I responded to Mr. Stromberg that I thought it
23 was quite an interesting idea that ought to be looked into and
24 that I would be anxious to visit with him about it when I
25 returned to the city.

A002107

Shainberg - Cross by Liebig

And I believe that was my first exposure to the idea of making a King Kong ~~film~~.

Q Mr. Stromberg, incidentally, was a producer on the payroll of Universal at the time?

A That is correct.

Q And in that conversation he said to you he had an idea for "a very big picture," didn't he?

A Yes, he did.

Q And at the time you were familiar with the RKO film King Kong?

A I was familiar with the fact that there had been a film called King Kong, at least one and maybe many.

Q And you felt it was --

THE COURT: He is not old enough, Mr. Liebig.

MR. LIEBIG: Pardon me?

THE COURT: He is not old enough.

BY MR. LIEBIG:

Q Well, you knew it as a remembered, known motion picture?

A As a remembered? What do you mean by that?

Q Well --

A I knew there was a film called King Kong. I had no knowledge at the time that it was an RKO film. And I, to the best of my knowledge, had never seen it.

A002108

Q Well, it was your understanding that it was considered a remembered, known film?

A Well, I guess I would have to say yes. It was considered a remembered, known film.

Q When you got back you discussed this policy with Mr. Wasserman, correct?

A I am sure I did on a number of occasions.

Q Would you tell us who Mr. Wasserman is?

A Mr. Wasserman is the chairman of the board and the chief executive officer of MCA, Inc.

Q And you also discussed it with a Mr. Ned Tannen?

A Yes, I did.

Q What was his post?

A Mr. Tannen is a vice president of MCA, Inc., and at that time was a senior executive in the motion picture division and subsequently thereto became executive vice president of Universal Pictures.

Q And it is true --

A And he happened to be the only person on the floor where Mr. Wasserman and I were physically situated.

Q Incidentally, the offices of MCA and Universal Studios are in the same place, are they not?

A In Los Angeles, yes.

Q That is, the executive offices.

A002109

1
2 A Yes, that is correct.

3 Q When you and Mr. Wasserman discussed this it was
4 your conclusion that you could have a very big film?

5 A Yes.

6 Q Something on the order of your company's Jaws?

7 A Hopefully.

8 Q Mr. Tannen, I think, believed it had a great com-
9 mercial potential?

10 A Yes.

11 Q Vast commercial potential?

12 A Yes.

13 Q Could you give the court some idea of what the
14 term "vast commercial potential" means in terms of the gross
15 of Jaws and Airport, some of those?

16 MR. GOLD: Your Honor, I am going to object as
17 irrelevant on what Jaws or Airport did in gross terms.

18 THE COURT: The objection is sustained.

19 MR. LIEBIG: Your Honor, it goes to motivation,
20 which I think we will tie up later.

21 THE COURT: Motivation for what? For making
22 the picture? You assume that to be.

23 MR. LIEBIG: Well, for the way they went about it,
24 I suppose. I think it will tie up. We will come back-
25

THE COURT:

A002110

BY MR. LIEBIG:

Q So after these discussions you had a man go to RKO and negotiate for rights to do a remake of the RKO King Kong picture?

A Well, in point of fact, when I first talked to Mr. Stromberg I believe Mr. Stromberg told me that they had already had a conversation with a senior business affairs executive of Universal City Studios and that this gentleman was already looking into it.

Q Well, there came a point in time, did there not, when you were aware that negotiations were going on between your company and RKO for the remake rights?

A Yes.

Q And there came a point in time when you believed that an agreement had been made?

A Yes.

Q And there came a point in time shortly thereafter, around early May 1975, where you were advised that RKO took the position that it had not made a deal with Universal?

A I can't remember whether it in fact was early May, but, putting aside the date, there came a point in time when it was brought to my attention that RKO took the position that it had no binding agreement.

Q I see. And at that point were you made

A00211.1

1 8:30 this evening.

2 THE COURT: All right.

3 MR. LIEBIG: He is getting my witness, your Honor.
4 Henry Martin.

5 MR. SIMON: The other part of our documents, your
6 Honor, I apologize, but a number have been put in by counsel
7 already and I would like to save as much time as possible by
8 going through and striking some of them.

9 MR. LIEBIG: Your Honor, I apologize. The witness
10 went to move his car because he was worried about getting it
11 locked in the parking lot. Can we take a five-minute recess?

12 THE COURT: Yes. Five minutes.

13 (Short recess.)

14 MR. LIEBIG: Your Honor, RKO will call as its
15 next witness Henry Martin.

16 THE COURT: All right.

17 MR. LIEBIG: This, of course, has to do with the
18 counterclaim.

19
20 HENRY H. MARTIN,
21 called as a witness on behalf of Defendant RKO, having been
22 first duly sworn, was examined and testified as follows:

23 THE COURT: Please be seated and state your full
24 name, and spell your last name.

25 THE WITNESS: Henry H. Martin, M-a-r-t-i-n.

A002112

DIRECT EXAMINATION

BY MR. LIEBIG:

Q Where do you work, Mr. Martin?

A Universal Pictures.

Q And you are a corporate vice president of MCA, is that correct?

A Yes, sir.

Q You also have the title of president of a couple of the MCA subsidiaries, is that correct?

A Yes, sir.

Q Would you tell us which MCA subsidiaries you are president of?

A I am president of Universal Pictures, which is a division of Universal Studios, Inc.

I am also president of Universal Film Exchanges, Inc., which is a wholly-owned subsidiary of Universal Pictures.

Q You have been involved in the motion picture business as I understand, for about 41 years, is that correct?

A That is right.

Q And essentially with the Universal organization even back before it was involved with MCA?

A That is right.

Q Your experience during those years has been in the sale and distribution of motion pictures?

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A That is right.

Q And it is true, is it not, that from time to time you were consulted by the top management of the group of companies. Is it fair to call them the Universal group or the MCA group? How should I --

A That is acceptable to me since it was Universal to a period in time and then it became Universal and MCA. That grouping is satisfactory to me.

Q You are from time to time called upon to consult with top management of the companies regarding the sales potential of motion pictures?

A Yes.

Q On occasion you even are called upon to give your affidavit with regard to whether or not picture titles could be confused with one another?

A Yes.

Q Now, there is before you a copy of an affidavit which purports to bear your signature in the case of Universal City Studios, Inc., v. Brian Stone Distributors, Inc., pending in the Supreme Court of the State of New York. That is a true and correct copy of an affidavit you gave in that suit where Universal as owner of a motion picture entitled "American Graffiti" sued Brian Stone Distributors, Inc., as owners or distributors of that motion picture entitled "Teenage Graffiti"

A002114

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1 Martin - Direct
2 alleging injurious similarity.

3 MR. GOLD: I would object, your Honor, as being
4 irrelevant to the issues in this case.

5 THE COURT: What is the relevancy, Mr. Liebig?

6 MR. LIEBIG: I think we will tie it up, your
7 Honor.

8 THE COURT: Tie it to what?

9 MR. LIEBIG: We are getting into the area of
10 secondary meaning, confusion of film titles, knowledge of the
11 plaintiff and counterdefendant Universal.

12 THE COURT: Do you think that is anything that is
13 going to be any problem, if there is a problem at all, about
14 King Kong and the Legend of King Kong in terms of being con-
15 fusing? Any problem with that? Do you need expert testi-
16 mony for that?

17 MR. LIEBIG: I don't really think I do, your
18 Honor, but I want to have a complete record. Here is a man
19 who not only is consulted by the company as to this sort of
20 matter but will testify as to the possibility of confusion in
21 this instance.

22 THE COURT: possibility of confusion is not the
23 subject of expert testimony in any event. Confusion to the
24 ordinary man, isn't it, to the average reasonable consumer of
25 the product, whatever it might be?

A002115

Martin - Direct

212

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2 MR. LIEBIG: Well, this man is a distributor and a
3 seller of motion pictures is, I think, expert or knowledgeable
4 in what the consumer -- that is, the moviegoing public under-
5 stands about titles.

6 THE COURT: No, he isn't. →

*Martin was really
an expert in selling pic-
tures in a way that
public thinks is helpful*

7 MR. LIEBIG: Pardon me?

8 THE COURT: No, he isn't. If it is confusing
9 in a particular circumstance that has to be measured by the
10 reasonable, ordinary consumer.

11 MR. LIEBIG: Well, I think --

12 THE COURT: The cases so hold that you can't do
13 that by expert testimony. That is one of the few things the
14 Circuit has affirmed me on.

15 MR. LIEBIG: I think there are also cases that say
16 it can be so obvious that you didn't need proof.

17 THE COURT: Well --

18 MR. LIEBIG: -- as the court was inferring earlier.

19 THE COURT: All right.

20 MR. LIEBIG: Let me ask a question for the record.
21 We will pass the affidavit for the moment.

22 Q Mr. Martin, in your opinion as a man who is respon-
23 sible for selling and distributing motion picture products
24 does the moviegoing public in its mind make an identification
25 between titles and pictures and the makers of the pictures?

Martin - Direct

MR. GOLD: I am going to object, your Honor, as irrelevant.

THE COURT: The objection is sustained.
BY MR. LIEBIG:

Q If a motion picture does well, would the identification, if any, be --

MR. GOLD: Objection, your Honor.

THE COURT: The objection is sustained.
BY MR. LIEBIG:

Q Mr. Martin, is it not the practice of motion picture companies, particularly your own company, operating on a belief that there is such an identity in a title and a picture to attempt to capitalize on a favorable identification by using or reusing all or part of a successful title?

MR. GOLD: Objection; irrelevant to the --

THE COURT: The objection is sustained.
BY MR. LIEBIG:

Q Is it not a fact that after the success of the motion picture Airport your company produced and distributed a motion picture entitled Airport 75?

MR. GOLD: Objection.

THE COURT: The objection is sustained.
BY MR. LIEBIG:

Q Is it true that after that success you produced a

Martin - Direct

1 motion picture entitled Airport, 76?

2 MR. GOLD: Objection; irrelevant.

3 THE COURT: The objection is sustained.

4 BY MR. LIEBIG:

5 Q Is it your understanding that your company is
6 currently contemplating a motion picture entitled Airport 77?

7 MR. GOLD: Objection; irrelevant.

8 THE COURT: The objection is sustained.

9 BY MR. LIEBIG:

10 Q The motion picture Sting was a Universal production,
11 was it not?

12 MR. GOLD: Objection.

13 THE COURT: Sustained.

14 MR. LIEBIG: Your Honor, maybe I can just shorten
15 this part of my questioning. I guess we could assume or
16 stipulate that the same objection and ruling would be made
17 with respect to Sting, Sting 2, Jaws, and Jaws 2.

18 THE COURT: All right?

19 MR. GOLD: So stipulated, your Honor.

20 BY MR. LIEBIG:

21 Q You are aware of the RKO motion picture King Kong,
22 are you not, sir?

23 A The original picture?

24 Q Yes.

25 A Yes.

A002118

1 Q In fact you have seen it once or twice?

2 A Yes, sir.

3 Q And you are aware it is a well-known motion picture.

4 THE COURT: Well known to whom, Mr. Liebig? My
5 children don't know anything about King Kong.

6 MR. LIEBIG: Well known to the public.

7 MR. GOLD: There is no foundation this witness
8 knows what the public knows.

9 THE COURT: The objection is sustained.

10 BY MR. LIEBIG:

11 Q In your opinion isn't the title King Kong identified
12 in the minds of the moviegoing public with the motion picture
13 King Kong?

14 MR. GOLD: Objection. It is irrelevant what
15 this witness' opinion is.

16 THE COURT: The objection is sustained.

17 BY MR. LIEBIG:

18 Q In your opinion --

19 THE COURT: There isn't much moviegoing public
20 that is left that was going to the pictures in the King Kong
21 days, not very much left as a moviegoing public.

22 MR. LIEBIG: Well, your Honor, there will be in
23 evidence that this movie has been shown many, many times since
24 its release in 1933, both on television and in motion pictures.
25

A002119

Handwritten notes and signatures:
7-10-68
R. G. ...
J. ...
...

1 in re-releases.

2 THE COURT: All right.

3 BY MR. LIEBIG:

4 Q Do you know, sir, that the movie has been in re-
5 release and shown on television? Are you aware of that?

6 MR. GOLD: I guess that is --

7 THE COURT: There is a well-recognized method of
8 doing that nowadays that has been accepted as evidence and that
9 is poll-taking.

10 MR. LIEBIG: I know that, your Honor.

11 THE COURT: An expert cannot tell you that. The
12 expert poll taker can tell you whether or not his poll is taken
13 properly and therefore the significance of a poll, but the
14 expert can't tell you what a poll that has not been taken is
15 going to result in.

16 MR. LIEBIG: This is a man, your Honor, whom
17 Universal relies upon to gauge the public acceptance of motion
18 pictures, in fact, gambles large sums on his 41 years of ex-
19 perience in that field.

20 THE COURT: I recognize that. I am telling you
21 what the law is today.

22 MR. LIEBIG: Could I get my whole question in
23 for the record?

24 THE COURT: All right.
25

A002120

BY MR. LIEBIG:

Q It is true, is it not, Mr. Martin, that in your opinion if somebody produced a motion picture with "King Kong" in the title the public would attend that movie believing that it was in some way connected with the original King Kong movie or the King Kong character?

MR. GOLD:

Objection.

THE COURT:

The objection is sustained.

MR. LIEBIG:

You may cross-examine.

MR. GOLD:

No questions, your Honor.

MR. SIMON:

No questions.

THE COURT:

Step down, Mr. Martin.

THE WITNESS:

I apologize for being late.

THE COURT:

No, I understand, Mr. Martin. The

parking around here is not that good.

9:00 o'clock tomorrow morning, gentlemen.

(Whereupon, at 6:30 o'clock p.m., Wednesday,

September 1, 1976, an adjournment was taken until

9:00 o'clock a.m., Thursday, September 2, 1976.)

A002121

Goldman - Direct

MR. LIEBIG: Thank you, your Honor.

RKO will now call Mr. Bo Goldman, G-o-l-d-m-a-n.

ROBERT GOLDMAN,

called as a witness on behalf of Defendant RKO, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please take the stand.

Please state your true name and spell your last name.

THE WITNESS: Robert Goldman, G-o-l-d-m-a-n.

THE CLERK: Please be seated.

DIRECT EXAMINATION

BY MR. LIEBIG:

Q What is your profession, Mr. Goldman?

A I am a writer.

Q Are you now specializing in motion picture writing?

A Yes, I am.

Q Would you tell the court some of the recent motion pictures you have written or been involved in the writing of?

A Well, I was coauthor of the screenplay of One Flew Over The Cuckoo's Nest.

I am involved now in the Melvin DeMarr Story.

I wrote the screenplay, in collaboration with two other people, of Pearl.

I wrote the screenplay of Switching.

A002122

1
2 I worked on the screenplay of The Judge And The
3 Hangman.

4 And I have done some work on the screenplay of
5 MacArthur.

6 Q In addition to motion pictures you have been in-
7 volved in television and plays and other forms of writing, have
8 you not, sir?

9 A Yes.

10 Q How long have you been a professional, full-time
11 writer?

12 A On and off for 20 years.

13 Q In August of 1975 were you employed by Universal,
14 sir?

15 A Yes.

16 Q Actually that was through your corporation, but
17 essentially they were hiring your services as a writer, is
18 that correct?

19 A Yes.

20 Q And you were hired by them, by Universal, that is,
21 to write a screenplay for a remake of the RKO motion picture
22 King Kong, were you not?

23 A Yes.

24 Q And who at Universal were you principally involved
25 with in August of '75 at the time of your employment?

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A Who did I speak to first?

Q Yes, sir.

A Ned Tannen.

Q And that did he tell you that Universal wanted you to do?

A He said they wanted to do King Kong and they wanted me to write it.

Q And did he tell you that they wanted to have the screenplay soon?

A No.

Q He didn't say anything about time?

A No.

Q At the time you were aware of the RKO motion picture were you not, sir?

A Yes, sir.

Q You had seen it before?

A Yes, I had.

Q You were aware that it was considered a classic?

A Yes, I was.

Q The first time you saw it was in 1972, wasn't it?

A Yes.

Q Where was that?

A In New York City.

Q Do you remember when your deposition was taken last

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December?

A Yes.

MR. LIEBIG: I wonder if we could put a copy in front of him.

MR. GOLD: Yes. Which volume?

MR. LIEBIG: Volume No. 1.

(Brief pause.)

BY MR. LIEBIG:

Q Would you read on page 24, sir, commencing at line 9 and going through line 22.

A "Besides what you have already told me, that Mr. Tannen said" --

Q No, just read it to yourself, sir.

A I'm sorry.

(After reading) Yes, I have read it.

Q Were those the questions and answers asked of you at that time?

A I believe so, yes.

MR. LIEBIG: Your Honor, I would like to read lines 19 through 22 referring to a discussion with Mr. Tannen.

MR. GOLD: Your Honor, I object. If he is going to read it, let him what he asked the witness to read, which is the full context.

MR. LIEBIG: I am trying to save time. I would

A002125

be happy to.

Question starting at line 9:

"Besides what you have already told me, that Mr. Tannen said that he had asked you if you would like to write King Kong, did he say anything else?

"A Well, he said he would like me to write King Kong for Universal and that they were enthusiastic about my work. And he asked me, you know, what my response was. And I said I would like to do it.

"Q Did he tell you how quickly he needed the screenplay?

"A No.

"Q Did he give you any advice about the urgency of the project?

"A As I recall, it was soon. He would like it soon."

Q Continuing where we were, sir, you first saw King Kong in a theater in New York in 1972?

A Yes.

Q And knowing the film was a classic, considered a classic, and having seen it, you had what you have described as a sort of reverence for the film.

MR. GOLD: I am going to object, your Honor. He

A002126

FLORENCE CAUGA OFFICIAL REPORTER

Goldman - Direct

1 is leading the witness.

2 This is direct and he should ask
3 his questions properly.

4 THE COURT: The objection is sustained.

5 MR. LIEBIG: Well, your Honor, I think this is a
6 man who is employed by the other side. He is obviously, I
7 think, a hostile witness.

8 THE COURT: He is not a hostile witness. He
9 hasn't shown any hostility.

10 MR. LIEBIG: He is not a hostile man?

11 THE COURT: Well, that is what hostility is, that
12 is what permits leading questions of a hostile witness.

13 MR. LIEBIG: Well, I should use "adverse." I
14 will do it that way.

15 THE COURT: He is neither adverse, he is not an
16 adverse party nor the agent of an adverse party.

17 BY MR. LIEBIG:

18 Q Mr. Goldman, did you have a reference for the RXG
19 King Kong film?

20 MR. GOLD: I am going to object, your Honor, as
21 leading.

22 THE COURT: The objection is overruled on that
23 ground.

24 THE WITNESS: I would use the word "respect."
25

A002127

BY MR. LIEBIG:

Q Pardon me?

A I would use the word "respect."

Q Was your intention to write a script for a faithful remake of the film?

MR. GOLD: I am going to object, your Honor, as leading.

THE COURT: The objection is overruled.

THE WITNESS: Could you repeat the question, please?

THE COURT: Read the question to the witness.

(Record read.)

THE WITNESS: May I say I don't understand what that means, "faithful remake."

I wanted to make my own film, but I wanted to do justice to the original.

BY MR. LIEBIG:

Q Well, could you open the deposition to Volume 2, page 255, and read lines 1 through 4. Was that the question and answer on that occasion, sir?

A (After reading) Yes, I believe so.

MR. LIEBIG: Your Honor, I would like to read those lines.

Q And you wanted your remake to be faithful

A002128

1 to the spirit or whatever of the original film,
2 would that have been the case?
3

4 "A Yes, that would have been the case."

5 Q Now, let's turn to the writing process.

6 Incidentally, about when did you start working on
7 the project?

8 A In August 1975.

9 Q And would you describe how you went about writing
10 your remake, what you did first?

11 A Well, I began some research. I tried to find
12 out everything I could about the original King Kong. There
13 had been volumes published about it, and I went to a cinema
14 bookshop and bought those volumes. I went to various film
15 libraries, books about films, like the AFI, UCLA, the Academy
16 Library, to read what had been written about it. I tried to
17 learn everything I could about King Kong through libraries,
18 through newspaper articles.

19 Then in a second period of research I tried to find
20 out everything I could about the substance of the story which
21 involved apes, Sumatra, Indonesia, tramp steamers, chemical
22 warfare, paleontology, New York in the '30s, the seamy side of
23 show business, characters who surfaced in the '30s who were
24 like third-rate versions of what Cousteau might be considered
25 today, things like that. Everything that might be useful to

A002129

me.

Q Did Universal help you in this research?

A In some part.

Q Well, did they screen the film for you over at Universal?

A They screened the film for me, yes.

Q Did you they supply you with some written materials?

A I asked for a copy of the original screenplay and they supplied me with it, yes.

Q You mean the RKO film screenplay?

A Yes.

Q Can you remember anything else they supplied you?

A Yes. They supplied me with Scientific Americans, some articles about Indonesia, some books about Indonesia and Sumatra. And a volume about a tramp steamer, I believe. There was a packet of materials which came which I had requested, which were generally useful.

Q Did they supply you with a transcript prepared by someone over at Universal by watching and listening to the film?

A They gave me an abbreviated transcript that was about 25 pages long, which was of no use.

Q I see. What did they tell you that transcript was?

1 meeting and a lot of them were resolved
2 because Ned made it clear that it was go-
3 ing to be an enormous project, a big bud-
4 get, it was one of the biggest pictures
5 of the year for Universal and that it was
6 going to break some new ground and be a
7 big challenge. I went home and thought
8 about it.
9

10 "Q You went home and thought about it?

11 "A Yes.

12 "Q What did Mr. Etkes say during that meet-
13 ing?

14 "A I don't remember specifically.

15 "Q Approximately how long did the meeting
16 last?

17 "A Half hour.

18 "Q Did Mr. Mount say anything during that
19 meeting?

20 "A He made some comments about the classic
21 nature of the film.

22 "Q Can you remember his words?

23 "A No.

24 "Q When he was referring to the classic
25 nature of the film, he was referring to

A002131

FLORENCE GARCIA OFFICIAL REPORTER

Sargent Deposition

the original RKO KING KONG?

"A Yes.

"Q What did you understand him to mean by
'classic'?

"A The way we usually apply the term, to
pictures that are well established in
audiences' minds as being of high cali-
ber and having made an enormous impres-
sion.

"Q Did you agree with that characterization?

"A Yes.

"Q Did you express your agreement at that
time?

"A Yes."

Page 25, lines 14 through 23:

"Q How many times have you seen KING KONG
to your knowledge? I am speaking now of
the original RKO movie.

"A Three times.

"Q Can you tell me what each of those three
times was?

"A The first was many years ago. I don't
remember quite when. That was my initial
exposure to it. The other two times were

A002132

Sargent Deposition
at Universal Studios -- no, I am sorry,
one was at Universal and one was on tele-
vision."

Page 106, line 12; through page 116, line 12:

"Q I think you pretty fairly recounted your
discussions with Mr. Goldman and with
the various Universal personnel regarding
the script.

"Can you tell us what else you have been
doing since August as director of this
project?

"A I am not sure I understand the question.
Could I have it back?

"Q It was a roundabout question.

"Your testimony is that you were hired
on as director of the KING KONG project
commencing in mid-August.

"A Yes.

"Q And Mr. Hunt in his questioning has gone
into some detail concerning what you have
done as far as talking with Mr. Goldman and
talking with other people about the script
since that time.

"A Yes.

A002133

1 reference.

2 Your Honor, these next exhibits go to the claim
3 of RKO that there has been some dilution of its exclusive
4 use of the name King Kong. They are evidence of a number of
5 uses of King Kong by third parties, none of which indicate
6 any reference to RKO. I would like to offer them one at a
7 time. They have been supplied to counsel.

8 THE COURT: All right.

9 MR. KROFT: I will identify them as I give them
10 to the clerk.

11 The first is Exhibit 119. It is a certificate of
12 registration of the claim to copyright, Registration No.
13 A1277602A -- it is not very well described but it seems to
14 be a comic book entitled King Kong. The author is listed
15 as Meriam C. Cooper, published by Western Publishing
16 Company. It indicates a date of the first publication
17 June 6, 1968. I suppose I should offer it with 120, which
18 is a certified copy of the comic book received from the
19 copyright office.

20 MR. LIEBIG: It is irrelevant. I don't see what
21 issue it bears on, your Honor. As the Court has pointed out,
22 we have enough exhibits here already.

23 MR. KROFT: Your Honor, this will go to all these
24 exhibits that I intend to offer. Maybe I can characterize
25

A002134

1 them generally so you know where I am going.

2 There are a few others of what you might call
3 prose works entitled King Kong, registered in the copyright
4 office with dates of publication listed. There are also a
5 number of songs published and registered for copyright in
6 the copyright office together with the number of phonograph
7 records using the name King Kong. When I get done with
8 those, your Honor, I intend to introduce evidence of several
9 cartoons using the name King Kong, all of which show a
10 wide use of the name King Kong, so much so that we believe,
11 your Honor, that the name King Kong is no longer subject
12 to dilution even if it once had any distinctive quality with
13 respect to the dilution statute in the State of California.

14 As such, it is not capable of any further
15 dilution as a basis of damages. That is not to say, of course,
16 that there couldn't be passing off of the name King Kong
17 by the party, but that does not seem to be RKO's theory here.

18 MR. LIEBIG: Your Honor, these documents, --
19 they show anything, they show use, which I suppose builds on
20 the secondary meaning. But in any event they don't show
21 unconsented use. The first one, for instance, is use on
22 a comic book licensed by Meriam Cooper. Under that grant
23 of rights he has in the --

24 THE COURT: Mr. Liebig, the question is dilution.
25 If there happens to be an awful lot of consensive use, you

A002135

653
1 can hardly dilute it by unconsented use if it is minimal,
2 can you?

3 MR. LIEBIG: Your Honor, dilution means somebody
4 wrongfully using it. If you use it yourself, then that is
5 not deemed dilution. In the law of trademark and unfair
6 competition, it is called use. Now, if you overuse anything
7 maybe it becomes so common it's not valuable, but that is
8 not dilution.

9 THE COURT: Well, what is it then? To what
10 subject matter does it go? In other words, that this is
11 not possible to be the subject of a dilution because it has
12 already been diluted by the owner himself to such an extent
13 that it does not mean anything?

14 MR. LIEBIG: Let's use the analogy of a gold
15 mine. If the owner of the gold mine and I shovel the gold
16 out and it becomes less and less of a mine with less and
17 less gold, I have nobody to blame. If somebody else comes
18 and does the shoveling, the fact is it is diluted.

19 THE COURT: No. If all they got is dirt, there
20 is no damage. They have to dig out gold. If you have taken
21 out all of the gold, there isn't anything left, Mr. Liebig,
22 using your example.

23 MR. LIEBIG: Well, let me try it from another
24 direction. This is a King Kong called Giant Classic Comic
25 Book, which I am sure will not fascinate the Court, 1968.

1 I suppose it is proof of secondary meaning. I don't know
2 why we want to clutter up the record. If we can let it all
3 in --

4 THE COURT: Let me understand something,
5 Mr. Liebig, because I'm lost here. Secondary meaning of what?
6 That is secondary meaning of RKO? You know, RKO and King
7 Kong are synonymous; is that what you are talking about?
8 That is what secondary meaning says, that when you see the
9 word immediately it gives you the idea of something else.
10 That is what secondary meaning is in the law.

11 MR. LIEBIG: I am familiar with the law, your
12 Honor.

13 THE COURT: All right.

14 MR. LIEBIG: Now, if the Court reads MGM, the
15 Metro-Goldwyn-Mayer vs. Lee, and some of the other cases we
16 have cited here, they show that you don't in this day and
17 age have to necessarily identify the name or trademark with
18 the actual manufacturing company. Now, you have these old
19 cases where the shredded wheat biscuit had to be identified
20 with National Biscuit Company, that type of thing. Today
21 the title could take on more of a life of its own. The
22 consumer learns about King Kong. He knows about King Kong.
23 He knows about the production. He doesn't really have to
24 know that it is RKO Radio Pictures that made it in 1934 for
25 there to be secondary meaning. Now, that is the state of

A002137

1 secondary meaning law today. Certainly in California,
2 under the cited cases, Jackson vs. Universal, MGM vs. Lee,
3 Johnson vs. 20th Century Fox, the title itself partakes the
4 secondary meaning; the reverence of the secondary meaning is
5 work, the product of the play, the show, whatever, not the
6 company that produced it.

7 THE COURT: I would be more interested because we
8 can save a lot of time as to what evidence thus far has gone
9 to that.

10 MR. LIEBIG: The long, continuous and wide claim
11 of copyrighted motion picture photoplay called King Kong.
12 The playing of that in theaters for the last 40 some years.
13 The testimony indicates it is still in the theaters. The
14 testimony indicates it is still on TV. There have been
15 sequels. There have been funny books.

16 Let's use an example of Mickey Mouse. I think
17 there is a huge and obvious value in Mickey Mouse. Mickey
18 Mouse Productions, and that value is irrespective of whether
19 the kid out in Nebraska knows Mickey Mouse is the property
20 of Walt Disney Productions, and we have a Mickey Mouse case
21 cited, it is the Air Pirate case, Walt Disney Productions vs.
22 Air Pirates in the Northern District of California, which
23 goes into that in great detail.

24 Now, that is what we understand to be the law,
25 and we have cited a great many cases which I think demonstrate

1 that beyond any possible doubt.

701

2 THE COURT: I recognize the case. I asked you for
3 the evidence.

4 MR. LIEBIG: The evidence, the long continued
5 widespread public use and acceptance and acclamation of
6 this motion picture and its various progeny; that is what
7 builds in the public's mind. Whether you want to call it
8 identification or recognition, it is something they know
9 and knowing it, they buy embodiments of it. They go into
10 these theaters, they turn on television stations, they buy
11 books. It has a value, the title, the character.

12 THE COURT: I do not understand what evidence is
13 there of that here. As far as the record is concerned,
14 Mr. Liebig, I do not have that anybody even bought one
15 comic book or went into one theater or bought one novel or
16 bought one tee shirt.

17 MR. LIEBIG: We have in evidence that Mr. Sheinberg,
18 the president of Universal, felt it was a valuable name and
19 property and it would bring people --

20 THE COURT: I recognize that, Mr. Liebig. That
21 is one man, and I am sure -- maybe the public regard doesn't
22 indicate it, but I am sure Mr. Sheinberg has made mistakes
23 in his lifetime. All of us --

24 MR. LIEBIG: Your Honor, when an identical title
25 is used -- we talked about surveys the other day, and we had

A002139

1 a discussion on them and their value. I went back to my
2 office and looked for some authority for the proposition
3 if the only way you can show identification in the public
4 mind is by survey, and frankly I didn't find it. I may have
5 overlooked it, but I have seen a lot of cases where it's
6 been proved other ways.

7 THE COURT: How, counsel?

8 MR. LIEBIG: I think the Court --

9 THE COURT: How other ways except by bringing
10 people in here, which happened in a case. They brought in
11 a lot of people to say, yes, I get confused by this or I
12 apply this name with such-and-such company. We had our own
13 poll in court.

14 How else have they proved it? Do you find any
15 cases where they have done it by other than expert testimony?

16 MR. LIEBIG: We don't have to prove confusion of
17 similar things here. Universal used the identical thing.

18 THE COURT: No, counsel. Have you found any
19 case where they have done it by expert testimony?

20 MR. LIEBIG: I have found cases where they have
21 done it with and without. MGM vs. Lee is one. There is
22 no expert testimony there. The Court said you are using
23 the same title. Jackson vs. Universal, they showed use.
24 They said the play ran in such-and-such and such-and-such
25 city. They had books; they had this or that; they didn't

1 go out to take a poll.

703

2 THE COURT: What I am telling you is did you find
3 any case in which it was done with expert testimony? Did
4 you read Carter-Wallace vs. Proctor and Gamble?

5 MR. LIEBIG: I have not found expert testimony
6 on that.

7 THE COURT: Did you read Carter-Wallace vs.
8 Proctor and Gamble? As I told you, it is one of the few
9 cases that I have been affirmed on in the Court of Appeals
10 so I remember it vividly.

11 MR. LIEBIG: I have led --

12 THE COURT: We will take our afternoon recess
13 for ten minutes.

14 (Short recess.)

15 MR. LIEBIG: Your Honor, on this pile of exhibits
16 and a vertible haystack of things, I suppose maybe what
17 I could do would be to just make an omnibus objection under
18 403 that based on considerations of undue delay, waste of
19 time or needless presentation of cumulative evidence and
20 irrelevance and let them go in. I just don't see where it
21 goes.

22 THE COURT: What are we talking about? What
23 pile of what?

24 MR. LIEBIG: Why don't we just show him what that
25 is, Mr. Kroft?

(Brief pause.)

THE COURT: All right. That objection is made,
is overruled.

330-A, 330-C, 330-D, 155, 154, 153, 152, 151, 150,
149, 148, 147, 146, 145, 144, 143, 142, 141, 140, 139, 138,
137, 136, 135, 134, 133, 132, 131, 130, 129, 128, 127, 126,
125, 124, 123, 122, 121, 120 and 119 and 330-B in evidence.

(Plaintiff's Exhibits 119, 120,
121, 122, 123, 124, 125, 126,
127, 128, 129, 130, 131, 132,
133, 134, 135, 136, 137, 138,
139, 140, 141, 142, 143, 144,
145, 146, 147, 148, 149, 150,
151, 152, 153, 154, 155, 330-A,
330-B, 330-C, and 330-D were
received in evidence.)

MR. KROFT: Thank you, your Honor.

The next documents I have, I advised Mr. Cooper's
attorneys that these documents are offered only on the counter-
claim and not against Mr. Cooper, the next documents are
offered only on the counterclaim. Exhibit 90, 91-A, 91-B,
91-C, 91-D.

MR. LIEBIG: I object to those on the grounds of
relevance. They self-evidently appear authorized uses by
Mr. De Laurentiis in connection with his movie so I don't
see what relevance there is.

MR. KROFT: Those are all of the ads placed by
Paramount and Dino De Laurentiis. I believe 190 is the
art work prepared by Dino De Laurentiis. I think the

A002142

1 relevance is nowhere on those ads does the name King Kong
2 appear -- on one of them it says there is only one King Kong,
3 and RKO's name does not appear there.

4 MR. LIEBIG: The resumption of our discussion
5 earlier, but I know of no requirement that RKO's name be
6 on there. If that is a point of relevance, it is --

7 THE COURT: It does go, Mr. Liebig, as to what
8 the public is going to think King Kong is, what it is. I
9 think there is probably a substantial, if you are asking
10 me to take any kind of judicial notice because I haven't
11 gotten any filings from you, but if you are asking me to
12 take notice I would think there is a substantial segment
13 of the public below the age of 20 who think King Kong comes
14 from songs and not from the motion picture done by RKO or
15 anybody else, for that matter. I do not have any basis upon
16 which to say that or it is a motion picture or anything
17 else, but that is the question that has been addressed,
18 what the public associates King Kong with. 91-C, -B, 91-D,
19 91-A and 90 in evidence.

20 (Plaintiff's Exhibits 90, 91-A,
21 91-B, 91-C, and 91-D were
22 received in evidence.)

23 MR. KROFT: I have a few more exhibits I would
24 like to interrupt the introduction of at this point to
25 call my last witness, Hunt Stromberg.

A002143

1
2 is, do you claim, sir?

3 A Five percent.

4 Q And you have in fact filed a lawsuit in that
5 regard, have you not?

6 A Yes, sir.

7 Q Well, Mr. Sheinberg testified earlier in the
8 week that you were the person at Universal who came up with
9 the idea of doing a remake of King Kong.

10 A Correct.

11 Q Is that correct?

12 A Yes.

13 Q And that you called him in New York City and
14 told him about this idea.

15 A Correct.

16 Q At the time you came up with the idea and called
17 Mr. Sheinberg, had you seen the RKO King Kong picture?

18 MR. KROFT: Objection, irrelevant.

19 THE COURT: The objection is sustained.

20 What is the point of that, Mr. Liebig?

21 MR. LIEBIG: Your Honor, I wanted some more
22 testimony as to public knowledge and identification,
23 secondary meaning. It seemed to me fortuitously this man
24 arrived on the stand and --

25 THE COURT: He is not the consuming public. He is

Stromberg - Cross

not the person to whom secondary meaning is addressed in the context of this lawsuit. It may be a secondary meaning to a producer, but that is not what we are talking about here.

MR. LIEBIG: This is the problem we got to with Mr. Martin, sir. It is his business to indicate -- he is just like the fisherman, he has to catch fish. If we want to find out how to catch the fish, it is pretty hard to ask the fish, but we can ask the fisherman. That is the category I put both Mr. Stromberg and earlier Henry Martin.

THE COURT: That presumes that he is an expert in poll taking, and you haven't qualified him as that or that he has taken a poll on which he can make the conclusion that King Kong has secondary meaning to the consuming public.

MR. LIEBIG: Well, your Honor, I don't want to beat this to death.

THE COURT: You qualify a fisherman as a man who has fished.

MR. LIEBIG: Pardon me?

THE COURT: You qualify a fisherman as a man who has fished. You have never qualified Mr. Stromberg as one who has taken a poll to make a determination to whether or not there is any secondary meaning to King Kong in the consuming public's mind.

MR. LIEBIG: Well, there are lots of different

ways --

THE COURT: If you do it today, Mr. Liebig, you might be in big trouble because I would expect, I don't know, but I would expect there are an awful lot of youngsters out there who think King Kong is a song done by one of those artists. If you asked them what is King Kong, they will tell you that.

MR. LIEBIG: I can't qualify as a poll taker, but --

THE COURT: And I cannot either, but I'm just telling you that I suspect that.

MR. LIEBIG: Well, there are various ways to fish, just as there are to find out what is in the public's mind.

THE COURT: Only one way to catch them.

MR. LIEBIG: Well, we got nets. We have line.

THE COURT: You have to know if the fish is going to bite what you put down there or the fish has been biting what you put down there is more important.

MR. LIEBIG: Well, the people who have managed to endure in the motion picture business have somehow discovered what the public will come to see, your Honor. They tell me that this is --

THE COURT: They may, Mr. Liebig, come to see

Stromberg - Cross

1 King Kong movies because it is a horror story or whatever
2 they advertise. They may know that they do that if you
3 have a giant gorilla, but they are not coming because RKO
4 made the picture of King Kong. That is what we are talking
5 about. It might be also because they hear that name King
6 Kong, and they have heard some song that might remind them
7 of something that may be pretty neat to them and for which
8 they might want to see a movie made for whatever reason.
9 But we don't know those reasons. I hardly think that your
10 clients as well as Universal would rest upon making a movie
11 and doing no advertising of their own on the theory that
12 they are going to fill the theaters with what is going to
13 be the overflow from King Kong in 1932 or '33. Just ain't
14 gonna do it.

15
16 MR. LIEBIG: No, sir. We were --

17 THE COURT: Okay?

18 MR. LIEBIG: We got to that in Mr. Martin's
19 deposition, although not in his testimony here. Well, I
20 won't beat it to death, your Honor, because I think you
21 have made very clear what your ruling is on the subject.

22 THE COURT: All right.

23 MR. LIEBIG: I have no further questions.

24 MR. KROFT: Nothing further.

25 THE COURT: Step down, Mr. Stromberg.

A002147

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. KROFT: I have no further witnesses, your Honor, just a few more documents.

THE COURT: All right.

(Brief pause.)

MR. KROFT: Your Honor, just a few more documents and then I think we will be in a position to rest our defense of the counterclaim. These again are offered only against RKO on the counterclaim.

THE COURT: All right.

MR. LIEBIG: No objection to those three. As a matter of fact, I will adopt them as my own on the issue of secondary meaning.

MR. KROFT: Your Honor, the first is 167, the next is 170 and the next is 171.

171, your Honor, is the song book full of a number of songs; one of them is King Kong. It appears about 60 percent down the left hand side of the title.

THE COURT: 167, 170, 171 in evidence.

(Plaintiff's Exhibits 167, 170 and 171 were received in evidence.)

MR. KROFT: Your Honor, the next two documents are news stories. The first one is 172. It appeared January 5, 1976, in an issue of Time Magazine. It is under

1 the "Show Business" section entitled "Monkey Business."

717

2 The next is a newspaper article taken from the
3 November 5, 1975 issue of the Los Angeles Times headed
4 "Two New Films Planned" and underneath that "King Kong" by
5 Charles Champlin. I would like to offer those next in
6 order.

7 MR. LIEBIG: No objection. In fact, we will
8 adopt those as evidence of notoriety and secondary meaning.

9 THE COURT: 172 and 173 in evidence.

10 (Plaintiff's Exhibits 172 and
11 173 were received in
evidence.)

12 MR. KROFT: Next, your Honor, is a copy of a
13 Peanuts cartoon strip in the Los Angeles Times this last
14 Sunday, August 29, 177-A.

15 MR. LIEBIG: No objection. I likewise adopt
16 that as evidence of notoriety to the comic strip reading
17 public.

18 THE COURT: 177-A in evidence.

19 (Plaintiff's Exhibit 177-A was
20 received in evidence.)

21 MR. KROFT: Your Honor, we previously marked as
22 Exhibit 180 several documents from the files of Dorothy
23 Jordan Cooper. I offer just two of them. I would identify
24 them as 180-A and 180-B. 180-A is a copy of a comic strip
25 from the Wizard of Id dated 9/20. We do not have the year.

A002149

THE COURT: 180-A.

(Plaintiff's Exhibit 180-A was
marked for identification.)

MR. KROFT: 180-B is a copy of, in fact, I
withdraw 180-B, your Honor. Perhaps I could replace it
with this document which does not come from the files of
Dorothy Jordan Cooper. It is a cartoon which was cut out
of the The New Yorker Magazine sometime since the state
court action was filed. I cannot identify it any further
than that, but Mr. Liebig has indicated he does not have
a problem with the foundation for it.

THE COURT: 180-B and 180-A in evidence.

(Plaintiff's Exhibits 180-A
and 180-B were received in
evidence.)

MR. KROFT: Your Honor, that concludes Universal's
defense of the counterclaim.

THE COURT: Any rebuttal?

MR. PETRICH: Your Honor, we have only to mark
certain pages of Mr. Gittleston's deposition. There are just
about five pages.

THE COURT: All right.

MR. PETRICH: Maybe if we -- if you would like
us to take a brief recess and do that?

THE COURT: Is there anything else, any other
live witnesses?

23
was
1 shown to be no actual damages —

843

2 THE COURT: I think Mr. Liebig has at least agreed,
3 if anything, it's statutory.

4 MR. KROFT: All right. I'll pass on that. There's
5 no sense belaboring that.

6 THE COURT: He wants punitive damages and lots of
7 money for that.

8 MR. KROFT: Well, I understand he does, your Honor,
9 but I don't think that he made the showing necessary to get,
10 under Count One, of course, attorneys' fees. He has to show
11 that there was some bad faith on the part of Universal in
12 producing and having the screenplay written with the inten-
13 tion to produce it.

14 But, my gosh, if nothing else is shown here, we have
15 close questions of law and I certainly think that Universal is
16 shown to have been in good faith here.

17 With respect to Count Two, the unfair competition
18 claim, I don't want to belabor the discussion about the second-
19 dary meeting that the Court had with Mr. Liebig yesterday. I
20 would only want to point out a couple of things.

21 One, Jackson vs. Universal, a case which Mr. Liebig
22 relies on, your Honor, makes it very clear that a finding of
23 whether there's a secondary meaning or not is a question of
24 fact and that question of fact has to be determined on all of
25 the evidence.

A002151

1 We don't think there has been any evidence intro-
2 duced at least by RKO to show that there is an exclusive
3 association by the public of the name RKO either with RKO or
4 with its motion picture.

5 The Carter-Wallace case which has been mentioned
6 several times here makes it very clear that strong evidence
7 for a finding that there is no secondary meaning is evidence
8 that other people, other users, have used the same mark that
9 the plaintiff lays claim to.

10 In this case we introduced a substantial amount of
11 evidence, your Honor, to show that there are third parties
12 apparently unconnected with RKO who have used the name King
13 Kong.

14 I'm not now talking about the two motion pictures,
15 King Kong versus Godzilla and King Kong Escapes, which appar-
16 ently were licensed by RKO, but rather the wealth of material
17 which we introduced from the copyright office.

18 You have the book by Fred Gavin entitled King Kong
19 and you have the monologue by Bob Newhart, Exhibit 124 and
20 the exhibit number on the book, by the way, Exhibit 122.

21 You have at least eleven songs entitled King Kong
22 and you have the name King Kong throughout.

23 You have several cartoons at least two of which are
24 in evidence, Exhibit 180 and 177-A.

25 All of this shows a lack of exclusivity of use by

1 RKO and at least having brought these matters forward, RKO
2 should have, if they thought or contended those documents or
3 songs -- or if they contended they were under permission from
4 RKO, your Honor, they should have come forth and proven it,
5 that it was by permission from RKO, your Honor, and the infer-
6 ence has to be to the contrary.

7 We don't think, your Honor, that there would be a
8 likelihood of confusion between Universal's advertisement --
9 and there was only one advertisement -- and RKO. There is
10 strong evidence I think in Exhibit 172 and 173, a newspaper
11 article from the Los Angeles Times and a news article from
12 Time Magazine both of which make it very clear that Universal
13 was not claiming any rights through RKO but rather was seeking
14 rights against RKO.

15 Mr. Liebig in his brief, counsel for RKO, seems to
16 indicate that, even in the absence of a showing of actual
17 damages -- I think on Count Two he acknowledges there was no
18 actual damages in terms of a loss of business or diversion of
19 revenues.

20 Nevertheless he seems to claim that he is neverthe-
21 less entitled to damages on a trademark dilution theory.

22 I would cite the Court to the case of Dawn vs.
23 Sterling Drug, Inc., a case which was cited, as I say, which
24 held that damages --

25 Your Honor, this is a Central District of California.

1 case. It specifically held that in California damages are not
2 available on a trademark dilution theory.

3 Very interestingly enough, by the way, the only pure
4 dilution case cited in RKO's brief, Polaroid Corporation vs.
5 Polaroid, Inc. at 319 Fed 2d 830. A dilution case.

6 The court granted an injunction for dilution but
7 specifically denied the request for damages and an accounting
8 for profits. We just don't think damages are available --

9 THE COURT: Well, let me ask you. Is this a trade-
10 mark or a trade name at all? Since in that movie, the trade-
11 mark or trade name as I saw it was the tower with the radio
12 beams, isn't it?

13 MR. KROFT: Well, that's a good question, your Honor.
14 We don't know --

15 THE COURT: Isn't that the trademark of RKO or it
16 was at that time?

17 MR. KROFT: It was certainly the identifying logo
18 of RKO.

19 We don't think King Kong can be a trademark because
20 of the dilution, because of its usage in the English language.
21 So much so that it's been diluted beyond RKO.

22 But we made that point and I don't want to belabor
23 it further.

24 That, your Honor, then brings me to the consent
25 issue. I don't think there can be any question that Mr. O'Shea

had the authority and was the agent of RKO to make the contract with Universal which he did make on April 15. There is no evidence to the contrary and RKO doesn't seem to contest the fact in these proceedings.

I also don't think there can be any dispute whatever that a contract was made -- and I don't want to burden the Court by reviewing all of the evidence, but I would like to briefly refer to three things that make it very clear that a contract was made on April 15, 1975.

Mr. Shane's testimony was uncontroverted by any witness. He stated he made a deal with Mr. O'Shea on April 15.

He stated on April 16 Mr. O'Shea, after receiving Universal's net profits rider, called him and asked him, "How do you compute net profits under our deal? I want to make sure I understand what you previously told me."

Then you have Mr. Stromberg who was called apparently gratis by Mr. O'Shea on either the 15th or 16th stating the same thing: "I made a deal."

Unless there be any doubt, you have Exhibit 97, Mr. Youngman's draft, a draft of a contract between Universal and RKO which contains all of the terms and conditions of the contract which Mr. Shane said that he made with Mr. O'Shea.

That then gets us to a legal question, a legal question which I think your Honor has correctly decided last week and that is whether the Statute of Frauds can be an issue

A002155

1 MR. LIEBIG: The whole point of Kong is that the
2 beast does capture the girl and she escapes and then in New
3 York he captures again.

4 I mean half the movie he's going around with her in
5 his hand. I can't think of any more important part of the
6 motion picture and this has no relation to it.

7 Well, again, it's in the record. I would say that
8 any similarity is totally ideational, unprotected character
9 and again it's a question of law.

10 So, you know, I'm either right or wrong.

11 On the matter of the so-called consent defense --
12 No. I have one more thing on the the unfair competition, the
13 claim against Universal.

14 The Court said, "Well, could King Kong even be a
15 trade name, could it be a trademark?"

16 And I would say as I tried to say yesterday that,
17 no, we don't think it's a trade name or a title. I mean, no,
18 we don't think it's a trademark. We think it is a title
19 which is protected by the principles of unfair competition.

20 That's all it has to be. Titles are treated some-
21 what differently than trade names. There is some similarity
22 in the treatment, but again all I can do is talk about Jackson
23 vs. Universal and MGM vs. Lee which sets that out.

24 So we do say it's a title and we say it's a valuable
25 title.

1 Now, Mr. Kroft in his argument said that there were
2 all these things showing uses of King Kong which were -- his
3 words were, "Well, they are apparently unauthorized"; and of
4 course nothing could be further from the truth and I think
5 Mr. Kroft is well aware --

6 THE COURT: Where is the evidence to the contrary?

7 MR. LIEBIG: Well, I'm going to come to that, your
8 Honor.

9 THE COURT: All right.

10 MR. LIEBIG: We've made our files on licensing open.
11 They have combed through them and that's where they found out
12 about most of these things.

13 The burden of showing unauthorized use is on Univer-
14 sal. The burden of proof on that point is on Universal.

15 We had in court and pretty well indexed the licens-
16 ing file, the RKO original licensing file.

17 If he wants to challenge any one of those and say he
18 has evidence that this was unauthorized, we can pull it right
19 out. That's what I had Mr. Robertson doing here.

20 THE COURT: Well, there's nothing on anything there
21 that indicates it's licensed.

22 MR. LIEBIG: Well, your Honor --

23 THE COURT: Wouldn't you have to have something on
24 the document or on the use --

25 MR. LIEBIG: No.

A002157

1 THE COURT: -- to indicate its license?

2 MR. LIEBIG: No.

3 THE COURT: In the absence of a license in hand?

4 MR. LIEBIG: Absolutely not. No. No requirement.

5 THE COURT: Every use is presumptively licensed or
6 is it the other way around? Every use is presumptively unli-
7 censed until proven to be licensed?

8 MR. LIEBIG: As in every other area, the law places
9 the burden on the owner -- the law places upon him the burden
10 to protect his property.

11 If RKO finds a use that's unlicensed, it knows it.
12 It goes after the person. It doesn't look at the particular
13 thing to see if it says licensed or unlicensed or --

14 THE COURT: I don't have any evidence that says
15 they did or didn't in this case.

16 MR. LIEBIG: All right.

17 THE COURT: I'm saying, Mr. Liebig, isn't the pre-
18 sumption that a use is unlicensed until it is proven to be
19 unlicensed?

20 MR. LIEBIG: No, sir.

21 THE COURT: Well --

22 MR. LIEBIG: Well, number one --

23 THE COURT: No?

24 MR. LIEBIG: Well, you asked me and I'm trying to
25 answer you.

1 Number one, the law usually presumes that things
2 are done lawfully.

3 Number two, I gather these things were attempted to
4 be put forth by Universal as an affirmative defense.

5 Now, your Honor, when you put forth something as an
6 affirmative defense, you have the burden of proof. They put
7 forth the use.

8 I said at the time that, as far as I'm concerned --

9 THE COURT: Other than by the owner of the copyright.

10 MR. LIEBIG: But they didn't put in any evidence as
11 to whether those uses were permitted or not permitted and
12 they have the burden. They were well aware at the time I
13 said to your Honor, "I don't see what these relate to, but in
14 some regard I will adopt them as my own exhibits because they
15 evidence use and secondary meaning," which they do.

16 Now, if counsel had wanted to try to prove any of
17 those were unlicensed, he was free to do it. He has had
18 access to our licensing files all along.

19 THE COURT: Why didn't you put it in, Mr. Liebig?

20 MR. LIEBIG: It wasn't my obligation. Why should
21 I prove something --

22 THE COURT: Even though the state of the evidence
23 is now that there was a use of the name by a person other than
24 the owner -- the claimed owner of the copyright?

25 MR. LIEBIG: Well, your Honor, that happens all the

A002159

879
1 time. There is in evidence the fact that RKO previously
2 licensed Mr. Beck who licensed Toho who made King Kong Meets
3 Godzilla who then had Universal distribute it.

4 You have King Kong Meets Godzilla out there. That's
5 authorized.

6 THE COURT: Well, I take it that was to show that
7 there had been no abandonment of the copyright by RKO and I
8 take it that that was to show that they were in a position
9 and they had the power to license.

10 MR. LIEBIG: No.

11 THE COURT: That's what that evidence is in for.

12 MR. LIEBIG: No. He put that in to show Dan O'Shea's
13 signature on this document in 1957 when, instead of being
14 seventy-seven he was fifty-eight.

15 He says that this shows that he has all this author-
16 ity.

17 THE COURT: That's the limited purpose for which it
18 was shown?

19 MR. LIEBIG: They went all around to get Mr. O'Shea's
20 name on a document. That was the reason they put it in. As
21 far as I'm concerned, it shows a continuing authorized use of
22 the title --

23 THE COURT: Let me put it to you differently. If
24 they had just put in, just put in the name of King Kong versus
25 Godzilla and said to the Court that was authorized by RKO

1 because it's presumptively done so, I don't think that you
2 would have allowed it, would you? 880

3 MR. LIEBIG: It would have depended on what they
4 put it in for?

5 THE COURT: All right.

6 MR. LIEBIG: If it was for showing use and would I
7 stipulate that it was authorized, yes, I would stipulate.

8 RKO got paid for it.

9 THE COURT: All right. Mr. Liebig, I think that
10 the law, the status of the law, is that, when a claimed use
11 of something that is copyrighted is done by other than the
12 owner of the copyright, presumptively it's unlicensed and if a
13 person who is using it wants to continue to use it he has to
14 prove that it's licensed.

15 MR. LIEBIG: Well, they weren't putting this in on
16 the copyright count.

17 THE COURT: Or use of the title of whatever --

18 MR. LIEBIG: Well, your Honor, it makes --

19 THE COURT: The person who is claiming the title.
20 The presumption that, if it's not attributed and it's used by
21 somebody other than the claimed owner, then the presumption is
22 that it's an improper use.

23 MR. LIEBIG: Well, your Honor, if that's the pre-
24 sumption, it's a new rule.

25 All I know is that the law presumes that the law is

1 obeyed and a defendant on the counterclaim -- I should say a
2 counter-defendant with an affirmative defense -- that he has
3 the burden of proof on that defense.

4 THE COURT: Mr. Liebig, in a copyright case, all
5 you've got to do is put in your copyright and show that the
6 other party used that name or that idea or that verbalization
7 and then rest. That's your case.

8 Infringed if that's all the case comes to.

9 The other side, who is now claiming use of it with-
10 out the person's name on it, has to come in and show that he
11 was licensed if that's the point. But the case of a copyright
12 infringement is: Copyright. Here's our work. Here's their
13 work. Rest.

14 You don't have to say, "We didn't license him."

15 MR. LIEBIG: Well, your Honor, the issue is clearly
16 drawn and I again --

17 THE COURT: Anything else on a prima facie case in
18 a copyright case? Copyright. Your work. Their work. Same.
19 That's all.

20 MR. LIEBIG: No.

21 THE COURT: You have to show it's unlicensed?

22 MR. LIEBIG: Well, lot's of times you find that
23 they both go back to a common source. I have a case like
24 that --

25 THE COURT: Mr. Liebig, come on. Come to this case

1 to my question.

882

2 MR. LIEBIG: All right. In this case when they put
3 in those King Kong things, they didn't put it in on the copy-
4 right issue. They put it in on the unfair competition on the
5 counterclaim.

6 THE COURT: Well, assuming they did that, it would
7 be the other party who would have to take it back to the com-
8 mon source if that's their claim for defense.

9 MR. LIEBIG: In any event --

10 THE COURT: In any event they need the copyright,
11 the work, the claimed infringing work, and then rest. That's
12 all.

13 MR. LIEBIG: Fine, but what does that have to do
14 with the use we're talking about here?

15 THE COURT: Because I'm saying that it is the party
16 who is claiming that it is licensed who has the burden of
17 showing that it is licensed.

18 MR. LIEBIG: I'm not claiming it's licensed.

19 THE COURT: Well --

20 MR. LIEBIG: He's claiming it's unlicensed.

21 THE COURT: It is presumptively unlicensed.

22 MR. LIEBIG: No, it isn't. That's where we disagree.

23 Anyway, I think we have beaten it to death, your

24 Honor.

25 THE COURT: They are doing it in reverse for you.

A002163